BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LINDA C. WELLS)	
Claimant)	
)	
VS.)	
)	
DURHAM D & M LLC)	
Respondent)	Docket No. 1,045,265
)	
AND)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requests review of the November 13, 2009 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery (ALJ).

ISSUES

The ALJ ordered respondent to provide medical treatment and pay temporary total disability (TTD) benefits as result of her December 19, 2008 accident.[1] The ALJ explained his reasoning as follows:

   Motion to change physicians is denied. No evidence of unsatisfactory care. Claimant was terminated for cause but the "good faith" requirement is no longer applicable to the Workers Compensation Act.[2]

Respondent appealed this decision alleging the ALJ exceeded his jurisdiction in awarding TTD benefits under these circumstances. Respondent contends that K.S.A. 44-

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[1] The ALJ also denied claimant's request for a change of physician but that issue is not the subject of this appeal.

[2] ALJ Order (Nov. 13, 2009) at 1. The parties' concede the ALJ is referring to the Supreme Court's recent pronouncement in *Bergstrom v. Spears Manufacturing Company*, __ Kan. ___, 214 P.3d 676 (2009) wherein the claimant's "good faith" attempt to find suitable post-injury employment was eliminated from the determination of a claimant's work disability under K.S.A. 44-510e(a). The ALJ concluded *Bergstrom* compelled him to disregard claimant's good faith (or lack thereof) in connection with respondent's decision to terminate his employment and claimant's entitlement to TTD benefits.

510c(b)(1)(2) authorizes TTD benefits only when the claimant is incapable of engaging in substantial gainful employment as a result of the injury. Those statutes provide, in relevant part:

> (1) Where temporary total disability results *from the injury* . . .

> (2) Temporary total disability exists when the employee, *on account of the injury,* has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment.[3]

Simply put, respondent maintains claimant's violation of the workplace rules authorized her dismissal and but for her actions, claimant would be accommodated and still be working. And it was claimant's own conduct that has given rise to her loss of employment, not her injury. Thus, respondent argues, the ALJ disregarded the express statutory language of K.S.A. 44-510c(b)(1)(2) when he failed to consider the evidence as to claimant's culpability in connection with her termination and respondent's capacity to accommodate claimant's restrictions.

Claimant argues that respondent's appeal should be dismissed for lack of jurisdiction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

(1)   Whether the employee suffered an accidental injury;

(2)   Whether the injury arose out of and in the course of the employee's employment;

(3)   Whether notice is given or claim timely made;

(4)   Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing

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[3] K.S.A. 44-510c(b)(1)(2).

order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.[4]

The Board has long held that the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing. And the ALJ has the authority to be wrong on that issue.

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[5]

The parties here agree that none of the issues set forth in K.S.A. 44-534a are in dispute in this appeal. Rather, the sole basis for this appeal is the allegation that the ALJ exceeded his jurisdiction in awarding TTD benefits.

Respondent poses a novel and as of yet untested legal argument. Distilled to its essence, respondent contends that the ALJ exceeded his jurisdiction in using the *Bergstrom* rationale to exclude any consideration of claimant's relative lack of "good faith" in connection with her entitlement to TTD benefits. In other words, *why* claimant was terminated was, in the ALJ's view, irrelevant. His only consideration was *whether* she was engaging in substantial gainful employment. Because she was not (due to her termination) she was granted TTD benefits.

Respondent maintains this analysis, in reality, flies in the face of the *Bergstrom* ruling as the ALJ has effectively ignored language contained within the statute that authorizes TTD benefits.

> This is not merely an instance of Administrative Law Judge Avery being wrong, yet having the jurisdiction to make the wrong decision. The statute is clear: claimant is only entitled to receive temporary total disability benefits if the underlying cause of her alleged temporary and total disability stems from the injury of which she complains. In this case it is undisputed that claimant's alleged temporary total disability is the result of her termination for cause, which made is such that Durham School Services could not offer her the accommodated positions it would have had she not been terminated. As the statute defines the criteria that must be met for a claimant to receive temporary total disability benefits, it also defines the criteria that must be met for an administrative law judge to make an Order that comports with the statute.[6]

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[4] See K.S.A. 44-551.

[5] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[6] Respondent's Brief at 9 (filed Dec. 10, 2009).

This Board Member does not find the ALJ exceeded his jurisdiction in awarding TTD benefits based on these facts and circumstances. Admittedly, respondent's legal analysis may well prove accurate if, and when, the Court of Appeals or Supreme Court has an opportunity to speak to this specific legal issue. Alternatively, the ALJ's analysis as to the expansive application of *Bergstrom* may be adopted by the appellate courts. But at this juncture, this member is unwilling to disregard long-held views regarding the ALJ's authority to - rightly or wrongly - grant or deny TTD benefits after a preliminary hearing. In sum, the ALJ might have granted TTD benefits based on an erroneous legal analysis but at this point in the litigation, that is his right and there is no justification for finding that he exceeded his authority in doing so.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[7] Accordingly, respondent and carrier's appeal is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[8] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the respondent and carrier's appeal of the Order of Administrative Law Judge Brad E. Avery dated November 13, 2009, is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this _____ day of January 2010.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
       Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
       Brad E. Avery, Administrative Law Judge

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[7] See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

[8] K.S.A. 44-534a.